No. 80-1372

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IN THE

Supreme Court of the United States

OCTOBER 1980 TERM

ROBERT E. KURZIUS, INC., ROBERT E. KURZIUS, ANNEMARIE KURZIUS and ADELE S. KURZIUS,

Petitioners,

against

INCORPORATED VILLAGE OF UPPER BROOKVILLE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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Question Presented

Whether a village ordinance, adopted eight years before a property owner acquires title to property in the village, is unconstitutional on its face per se merely because it prescribes a five acre minimum plot for each dwelling.

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Statement of the Case

In December 1960, the respondent enacted a zoning ordinance which, among other things, limited construction of dwellings in certain areas to plots two acres in area, and in others five acres in area. (9a - 10a)

In 1968 the corporate petitioner purchased a parcel of land in the village containing about sixty acres, of which ten acres were in a two acre zone, the balance in a five acre zone.

The corporate petitioner subsequently prepared, filed and had approved a development map for the entire parcel. It built and sold out the entire two-acre subdivision, and built dwellings on two of the five acre parcels which were then conveyed to persons connected with the principals

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Unless otherwise indicated, numbers in parentheses refer to pages in the record below.

in the corporate plaintiff. (Petition for Writ, p. 5)

Without attempting to seek a change of zone, a variance, or other relief, the petitioners in April 1974 commenced a declaratory judgment suit seeking a judgment declaring the ordinance as applied to their property unconstitutional for various reasons. (29a - 33a)

After a bench trial, the Supreme Court adjudged that the ordinance was valid. The Appellate Division, agreeing that none of the other objections to the ordinance was proven, reversed Trial Term on the sole ground that a five acre limit on a residential plot in any part of the Village was per se unconstitutional as a matter of law. Kurzius v. Inc. Village of Upper Brookville, 67 AD 2d 70, 71, 76, 83. (Appendix to Petition)

The Court of Appeals, agreeing that

the only question to be determined was whether the five acre zoning was exclusionary per se and an impermissible exercise of the police power, reversed the Appellate Division and held that the five acre zoning was not exclusionary per se, and that it was not exclusionary but valid as a matter of fact and law. Kurzius v. Inc. Village of Upper Brookville, 51 N.Y.2d 338, 343, 346. (Appendix to Petition).

Petitioners in this Court now attempt to attack the ordinance as unconstitutional, not as applied to their property, but per se, because it is exclusionary and an improper exercise of the police power. (Petition, p (i), 20, 49)

POINT I

THE PETITIONERS LACK STANDING TO CHALLENGE THE ORDINANCE AS "EXCLUSIONARY" BECAUSE THEY HAVE NOT BEEN EXCLUDED FROM THE VILLAGE, AND BECAUSE THEY CANNOT SATISFY THE PRUDENTIAL PRINCIPLES ESTABLISHED BY THIS COURT.

It is fundamental to the jurisdiction of this Court to grant certiorari that the petitioners have standing to make the application, and that question must be addressed first even if not raised below.

Duke Power Co. v. Carolina Environmental Study Group
438 U.S. 59, 68

Roe v. Wade, 410 U.S. 113, 124, 125

The corporate petitioner has been a landowner in the village since 1968. The individual petitioners have been residents since 1970 after purchase of their properties, in one way or another, from the corporate petitioner. The ordinance had been in effect for eight years before the

latter purchased its property. None of the petitioners has been "excluded". Therefore their attempted attack on the ordinance as "exclusionary" is not being mounted in their own behalf, but on behalf of some imaginary group which has been or may be unable to afford to purchase land in the village. This is not constitutionally permissible.

U.S. Const., Art III, Sec. 2

Duke Power Co. v. Carolina Environmental Study Group
438 U.S. 59, 71

Warth v. Seldin
422 U.S. 490, 498, 499

Arlington Heights v. Metropolitan Housing Dev. Corp.
429 U.S. 252, 260, 261, 263

Even if the Court should find that petitioners technically have standing, they should be denied standing to assert the "exclusionary" claim under the facts of this case prudentially, as not being best

suited to present the claim of others for adjudication, because they have not been excluded.

> Gladstone Realtors v. Village of Bellwood
> 444 U.S. 91, 99 S. Ct. 1601, 1608

But the question of standing aside, the New York Court of Appeals has expressly found that the ordinance is valid, and not exclusionary in fact or per se.

> "[1,2] A zoning ordinance will be invalidated on both constitutional and State statutory grounds if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect (Matter of Golden v. Planning Bd. of Town of Ramapo, supra; Berenson v. Town of New Castle, supra). However, in this case, because there was insufficient and, indeed, a complete absence of proof of regional needs or a discriminatory purpose and no proof that the zoning ordinance in question has excluded or will exclude persons having a need for housing within the municipality or within the region, the issues are narrowed to the questions of whether five-acre zoning is

exclusionary per se and an impermissible exercise of the police power***."

* * * * *

"Absent a showing by plaintiff of an exclusionary purpose behind a zoning ordinance, or that the zoning authority had failed to meet the criteria set forth in Berenson, the presumption of constitutionality which accompanies the legislative act must prevail unless the ordinance is without a doubt facially invalid. Based upon the record before us, we cannot say that the ordinance in question was an unreasonable and improper exercise of the police power, or beyond the power delegated by section 7-704 of the Village Law."

"Although some courts have asseredly found multiacre zoning to be per se exclusionary and thus invalid (Developments in the Law-Zoning, 91 Harv L Rev 1427, 1641) we do not so hold because of what we perceive to be legitimate purposes of such zoning (see Agins v City of Tiburon, ___US___, 100 S Ct 2138, supra; Levitt v Incorporated Vil. of Sands Point, 6 NY2d 269). In regard to a related question, the Supreme Court has noted that '[a] quiet place where yards are wide, people few, and motor vehicles

> restricted are legitimate guidelines in a land-use project addressed to family needs' (Village of Belle Terre v Boraas, 416 US 1, 9). Although environmental factors may justify large-lot zoning, we do not hold that this type of zoning is permissible without qualification, because minimum lot requirements may involve exclusionary practices." (51 N.Y.2d 338, at 343 and 346. (Appendix to Petition - Emphasis added.)

In short, the New York Court of Appeals found that petitioners completely failed to prove their case on any of the theories propounded in their attempt to invalidate the ordinance.

POINT II

THE ONLY FEDERAL QUESTION PRESENTED ON THIS APPLICATION IS WHETHER A FIVE ACRE AREA ZONING LIMITATION FOR BUILDING PLOTS IS ON ITS FACE UNCONSTITUTIONAL, AND THERE IS NO PERSUASIVE SHOWING THAT THIS COURT SHOULD UNDERTAKE THE ADJUDICATION OF THE QUESTION.

Although the petitioners assert that the constitutional questions involved in this application are deprivation of property without due process or compensation in violation of the 5th and 14th amendments, (Petition, p.p. 2 and 3) they tender no such issue to this Court. All they present is an invitation to the Court to declare that five acre zoning anywhere is unconstitutional per se, without regard to the surrounding facts and circumstances. The New York Court of Appeals in this case has explicitly refused to make such a

declaration. Such a rule of law has never been laid down by this Court (or any Federal Court, so far as we know) and the invitation should be refused. To impose such a rule by judicial fiat would be an improper and arbitrary interference with legislative process, and would fly in the face of this Court's established guidelines in zoning matters.

Ever since Euclid v. Ambler Co., 272 U.S. 365, this Court has recognized the validity and desirability of zoning control of land use. The Court has also understood, as does the New York Court of Appeals, that zoning enactments result from the balancing of numerous compelling considerations, and that courts should refrain from reviewing the merits of legislative decisions, absent a showing of arbitrariness or irrationality.

Arlington Heights v. Metro. Housing Dev. Corp.
429 U.S. 252, 265

Village of Belle Terre v. Boraas
416 U.S. 1, 9

Shepard v. Village of Skaneatelas
300 N.Y. 115, 118

The Court agrees with the state courts that the legislative enactment enjoys a strong presumption of constitutionality, and that one who attacks the legislation carries a very heavy burden of proof.

Huntington v. Park Shore Country Day Camp, 47 N.Y.2d 61, 65

Marcus Associates v. Town of Huntington, 45 N.Y.2d 501, 505

Berenson v. Town of New Castle
38 N.Y.2d 102, 107

Goldblatt v. Town of Hempstead
369 U.S. 590

Bibb v. Navajo Freight Lines
359 U.S. 520

The Court has further concluded that restrictions to residential use and the preservation of open space are legitimate

objects of zoning control and promote the general welfare, even though enacted after the purchase of the affected land.

Village of Belle Terre v. Boraas
416 U.S. 1, 9

Penn Central Tr. Co. v. New York
438 U.S. 104, 129

Agins v. City of Tiburon, ___U.S. ___, 100 S. Ct. 2138, 2142

The ordinance had been in effect for eight years when the corporate petitioner entered the village and purchased its property, which was zoned partly for two acres and the rest for five acres. It mapped the entire property, and sold all the two acre plots. It has sold two of the five acre plots. The petitioner is free to pursue its legitimate investment expectations by building on and selling its five acre lots. Although it made some attempt at trial to show that it could not economically build and sell on five acre plots, the trial

court found there was no convincing proof of that. The corporate petitioner then abandoned that line of attack, and in both appellate courts below (and on this application) attacked the ordinance solely as unconstitutional, not as applied to petitioner's property, but facially and per se as to all the property in the Village or anywhere else zoned for five acres, simply because the area limitation was five acres.

The cases cited by the petitioners as suggesting a review by this Court of the New York Court of Appeals' refusal to declare five acre zoning unconstitutional per se, either involved completely dissimilar facts, or did not make a per se determination.

Board of Supervisors v. Carper, 200 Va. 653, involved a rezoning of two-thirds of the County of Fairfax from one half acre to two acres. Fairfax County contains over

400 square miles, or 258,000 acres. The whole village herein contains 2737 acres.

In National Land v. Kohn, 215 A2d 597, 607, 608, the Pennsylvania court refused to hold that any particular area limitation was invalid per se:

> "Every zoning case involves a different set of facts and circumstances in light of which the constitutionality of a zoning ordinance must be tested. Therefore, it is impossible for us to say that any minimum acreage requirement is unconstitutional per se."

The zoning was invalidated because the property was upzoned while the developer was in the process of seeking subdivision approval, and was an attempt to overcome the population explosion.

In Appeal of B-K Properties, 405 A2d 1083, the court sustained a five acre lot requirement, and in De Caro v. Washington Township, 344 A2d 725, 728, the court reiterated its conclusion that "minimum

lot sizes are not unconstitutional per se."

Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, did not involve a per se invalidation based on area, but on the facts of the case the ordinance was invalidated as "unreasonable".

In County Commissioners of Queen Anne's County v. Miles, 228 A2d 450, the Maryland Court of Appeals sustained a five acre lot minimum.

In Steel Hill Development, Inc. v. Town of Sanbornton, 469 F2d 956, the six acre zoning was upheld, and there was no per se ruling. Although the court was disturbed by the fact that there was no professional study made on which to base the acreage limitation enacted to protect the values cherished by the people of the town, it recognized that a balance could be struck between the ecological and population pressures. In contrast, the ordinance

involved here was adopted after an eighteen months study by a professional planner. The New York Court of Appeals expressly found that there was no proof the ordinance violated the balancing and other tests established by that court in Berenson v. Town of New Castle, 38 N.Y.2d 102. (Kurzius v. Village of Upper Brookville, 51 N.Y.2d 338, 342, 345, 346 - Appendix to Petition). The dicta of the Steel Hill court expressing its "serious worries" over the motivation of the town meeting does not call for any review.

The arguments in Point III of the petitioners' brief directed to the proposition that the ordinance in question was adopted in violation of the New York Village Law should not long detain this Court. The New York Court of Appeals has expressly found to the contrary (Kurzius v. Village of Upper Brookville, 51 N.Y.2d 338,

346, 347 - Appendix to Petition). That interpretation and application of state law does not present a federal question reviewable by this Court.

Patterson v. Colorado,
205 U.S. 454, 461

Agins v. City of Tiburon,
100 S.Ct. 2138, 2141

The ordinance involved in this petition is not graven in stone. It may well be amended in the future, and facts and circumstances not now existing may at some time compel an amendment by judicial direction, even if the legislative body does not initiate a revision. The New York Court of Appeals has declared that this ordinance is not exclusionary, and that it will not tolerate any zoning ordinance which is found to be exclusionary as a matter of fact. No further judicial review is necessary or justified.

CONCLUSION

FOR ANY AND ALL OF THE FOREGOING REASONS, CERTIORARI SHOULD BE DENIED.

March 1981

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